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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. AARON MARCELL HUTCHERSON, Defendant and Appellant.	A141203 (Contra Costa County Super. Ct. No. 05-130335-3)

Aaron Marcell Hutcherson appeals from a judgment of conviction and sentence imposed after he entered a no contest plea to possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) He contends the court erred in denying his motion to suppress evidence, and in imposing a criminal justice administration fee (Gov. Code, § 29550) before determining he had the ability to pay it. Hutcherson further contends a probation report fee should be stricken from a written order of probation because the court did not mention the fee at the sentencing hearing. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

An information charged Hutcherson with one count of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and alleged that he had four prior felony convictions (Pen. Code, § 1203, subd. (e)(4)). Hutcherson initially entered a plea of not guilty and denied the priors.

A. Preliminary Hearing and Motion to Suppress

At the preliminary hearing, Antioch Police Officer Gary Bostick testified that he was on routine vehicular patrol with a citizen rider on October 30, 2012, when he saw Hutcherson walking west on Sycamore Drive. Bostick maneuvered his vehicle along the curb where Hutcherson was walking, stopped about 10 feet past Hutcherson, and illuminated the area with his vehicle's spotlight.

Officer Bostick, in uniform, and the citizen rider, dressed in plainclothes, got out of the vehicle. Bostick walked around the car to the sidewalk and approached Hutcherson. Hutcherson stopped, although the officer had not obstructed his path.

Officer Bostick asked Hutcherson, "Do you mind if I speak to you? Do you have any I.D.?" Hutcherson responded, "Yeah" and handed his California identification card to the officer. Bostick asked Hutcherson if he had anything illegal on his person and Hutcherson replied, "I don't think so." This answer "stuck out to" Bostick because "[i]f you have something illegal on your person, you generally would know if you did." Bostick asked, "Well, if you had anything illegal on you, what would it be?" Hutcherson answered, "I got a little bit of ice in my pants pocket." Having heard the term "ice" at least 100 times, Bostick knew it was common slang for methamphetamine.

Officer Bostick searched Hutcherson's left pants pocket and found two zip-lock bags containing small shards of a white crystallized substance. Based on his training and experience, the officer believed the bags contained a usable amount of methamphetamine. A criminalist later confirmed the substance was indeed methamphetamine.

Hutcherson moved to suppress the evidence introduced against him, on the ground it was obtained after an unlawful detention. The magistrate denied Hutcherson's motion, concluding the encounter between Hutcherson and police was consensual, and held Hutcherson to answer.

B. Renewed Motion to Suppress Evidence and Dismiss the Information

In May 2013, Hutcherson filed a motion to suppress evidence (Pen. Code, § 1538.5) and dismiss the information (Pen. Code, § 995), again contending the evidence relied on by the magistrate at the preliminary hearing was seized as a result of an unlawful detention. After a hearing, the court denied the motion.

C. Plea and Sentence

On February 25, 2014, pursuant to a negotiated disposition, Hutcherson entered a plea of no contest to misdemeanor possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

The court suspended imposition of sentence and placed Hutcherson on probation for three years, subject to specified terms and conditions. As to one of these terms, the court ordered Hutcherson to pay certain fines and fees, including a $564 criminal justice administration fee (Gov. Code, § 29550), and referred him "to the court's collections and compliance unit for an evaluation as to [his] ability to pay these fines and fees." In addition, a written "Misdemeanor Order of Probation," also dated February 25, 2014, indicated that Hutcherson was required to pay a $176 probation report fee (Pen. Code, § 1203.1b), although the court had not mentioned a probation report fee at the sentencing hearing.

Hutcherson thereafter filed this appeal, challenging the denial of his motion to suppress and the imposition of the fees as aspects of his sentence.

II. DISCUSSION

We address each of Hutcherson's contentions in turn.

A. Motion to Suppress

Hutcherson contends he was detained by Officer Bostick within the meaning of the Fourth Amendment, the officer lacked reasonable suspicion that he was involved in criminal activity, and the trial court should have suppressed Hutcherson's ensuing statements to the officer and the methamphetamine found on his person.

Where, as here, the trial court ruled on a renewed motion to suppress and motion to set aside the information based on the evidence presented to the magistrate at the preliminary hearing, we look directly to the magistrate's findings. (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 678-679; *People v. Laiwa* (1983) 34 Cal.3d 711, 718.) We defer to the magistrate's factual findings, if supported by substantial evidence, and rule de novo whether the police conduct was lawful based on those facts. (*Ramsey*, *supra*, at pp. 678-679; *People v. Trujillo* (1990) 217 Cal.App.3d 1219, 1223; *People v. Saunders* (2006) 38 Cal.4th 1129, 1134.)

1. Law Regarding Detentions

The threshold question—and the only one we will need to address to resolve Hutcherson's challenge to the denial of his suppression motion—is whether the encounter between Hutcherson and Officer Bostick constituted a detention within the meaning of the Fourth Amendment. Consensual encounters between police and a citizen do not trigger Fourth Amendment scrutiny, but detentions do. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821 (*Manuel G.*).)

A person is detained if he or she is physically seized or submits to a display of authority. (*Manuel G.*, *supra*, 16 Cal.4th at p. 821.) As relevant here, the test is whether a reasonable person under the circumstances would have believed he or she was not free to leave, to decline the officer's request, or to otherwise terminate the encounter. (*Florida v. Bostick* (1991) 501 U.S. 429, 436 (*Bostick*); *Michigan v. Chesternut* (1988) 486 U.S. 567, 573; *United States v. Mendenhall* (1980) 446 U.S. 544, 554.) Or, to put it differently, the question is whether the police, by words and conduct, communicated to the individual that compliance with their requests was required. (*Manuel G.*, *supra*, 16 Cal.4th at p. 821.)

2. Application

Hutcherson contends he was detained based on the cumulative impact of five factors: (1) As Hutcherson was walking down the street on the sidewalk, Officer Bostick stopped his police vehicle, got out, and approached him, illuminating him with

a spotlight; (2) Hutcherson was alone when he was approached by Bostick and a second person, whom Hutcherson would reasonably assume was another police officer; (3) Bostick asked Hutcherson for identification and whether he possessed anything illegal; (4) Bostick retained Hutcherson's identification during questioning; and (5) Bostick did not tell Hutcherson he was free to leave or decline to answer questions.

None of these factors compels the conclusion that a detention occurred. A police officer may get out of his patrol vehicle and approach a person on the street without implicating the Fourth Amendment. (E.g., *In re Kemonte H.* (1990) 223 Cal.App.3d 1507, 1511-1512 [officers pulled their vehicle to the curb, got out, and quickly walked toward the defendant].) Illuminating a suspect with a spotlight does not convert a consensual encounter into a detention. (*People v. Garry* (2007) 156 Cal.App.4th 1100, 1111 (*Garry*); *People v. Perez* (1989) 211 Cal.App.3d 1492, 1494-1496 [use of high beams and spotlights, without activation of emergency lights, did not constitute required showing of police authority].) There was no indication that the citizen rider said or did anything as a display of force, even if a person in Hutcherson's position would have mistakenly thought he was a member of law enforcement. Furthermore, an officer's request for identification does not transform a consensual encounter into a detention. (*People v. Leath* (2013) 217 Cal.App.4th 344, 350-353 (*Leath*); *People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1370 (*Cartwright*); *Bostick, supra,* 501 U.S. at p. 434.) Asking Hutcherson if he possessed anything illegal did not trigger a detention either. (*Cartwright, supra,* 72 Cal.App.4th at p. 1370.) And although the officer did not tell Hutcherson he was free to leave, the absence of such an admonishment does not automatically create a detention. (*United States v. Drayton* (2002) 536 U.S. 194, 199, 203-207 (*Drayton*).)

Hutcherson nonetheless argues that the *combination* of these factors converted their consensual encounter into a detention. His reliance on *Garry* in this regard is misplaced.

In *Garry*, a police officer parked his patrol car about 35 feet from the defendant, shined his patrol car's spotlight on him, and walked briskly toward him, asking whether

he was on probation or parole. (*Garry, supra*, 156 Cal.App.4th at p. 1104.) Observing that the urgency of the officer's approach must be considered, the court found that a detention had occurred. (*Id*. at pp. 1110-1112.) The court noted that the officer, "*immediately* after spotlighting defendant, *all but ran directly at him*, covering 35 feet in just two and one-half to three seconds, asking defendant about his legal status *as he did so*." (*Id.* at p. 1112, italics added.) On these facts, *Garry* concluded that "any reasonable person who found himself in defendant's circumstances, suddenly illuminated by a police spotlight with a uniformed, armed officer *rushing directly at him asking about his legal status*, would believe [himself] to be 'under compulsion of a direct command by the officer.' " (*Ibid*., italics added.) Therefore, the officer's "aggressive" and "intimidating" actions created a detention. (*Ibid.*)

Garry is distinguishable from the matter at hand. Officer Bostick parked his vehicle and walked—not ran or rushed—toward Hutcherson. The officer first asked for permission to speak to Hutcherson and asked for his identification, as opposed to questioning him about his legal status while rushing directly at him. Although Bostick asked Hutcherson if he possessed anything illegal, there is no evidence he did so in a manner so aggressive or intimidating as to lead a reasonable person to believe he could not decline to answer and leave.

Hutcherson next argues that Officer Bostick's retention of his identification card during questioning created a detention. For this proposition, he relies on *People v. Castenada* (1995) 35 Cal.App.4th 1222 (*Castenada*), which acknowledged that an officer's request for identification was permissible, but "once [the defendant] *complied* with [the] request and submitted his identification card to the officers, a reasonable person would not have felt free to leave." (*Id*. at p. 1227, italics added.)[1]

[1] Hutcherson also cites *Florida v. Royer* (1983) 460 U.S. 491. There, however, the officers retained the suspect's documents while they asked him to accompany them to a small room, saying that they suspected him of transporting narcotics. (*Id*. at pp. 501-502.) No such facts occurred here.

Castenada is not persuasive, at least under the circumstances of this case. In the first place, the *Castaneda* rule " 'eviscerate[s] the rule that a law enforcement officer may ask an individual for identification without having any suspicion that he or she committed a crime, because as soon as the individual complies with the constitutional request, an unconstitutional seizure will have occurred." (*Leath, supra*, 217 Cal.App.4th at p. 353.) As the court held in *Leath*, an individual's voluntary relinquishment of identification does *not* constitute a seizure as long as the encounter is consensual under the totality of the circumstances, since the individual can request the return of his identification and leave the scene. (*Ibid.*)[2]

Furthermore, under the circumstances here, Officer Bostick's retention of Hutcherson's identification card during their brief conversation did not convert what had been a consensual encounter into a detention. There is no indication of any appreciable lapse of time between the moments Bostick received the identification card, asked Hutcherson if he possessed anything illegal, and followed up with the nonaccusatory query, "[I]f you had anything illegal on you, what would it be?"

Hutcherson argues that his responses to Officer Bostick's statements—agreeing to talk, handing over his identification, and admitting possessing methamphetamine—demonstrate that he submitted to the officer's show of authority. To the contrary, given the absence of any words or conduct by law enforcement that would leave a reasonable person in Hutcherson's position to believe he was required to answer, Hutcherson's responses to the officer's inquiries merely reflect the consensual nature of the encounter.

Under the totality of the circumstances, Hutcherson was not detained. There was no overwhelming show of force or police presence. Officer Bostick did not activate his emergency lights, display his firearm, block Hutcherson's path, make intimidating

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[2] We also note that Castenada turned over his identification to police after officers asked him if he knew the owner of the illegally parked car in which he was sitting. (*Castenada, supra*, 35 Cal.App.4th at pp. 1225-1226.) Here, by contrast, Hutcherson turned over his identification after Officer Bostick merely asked if he had any identification, under far less accusatory circumstances.

movements, issue threats or commands, speak in an aggressive manner, or hold Hutcherson's identification card for an undue amount of time. (See *Drayton, supra,* 536 U.S. at pp. 199, 204 [no detention where police officers boarded a bus and one of them asked defendant if he would consent to a search of his person, where there was no application of force, intimidating movements, overwhelming show of force, brandishing of weapons, blocking of exits, threat, command, or authoritative tone of voice, even though defendant was not told he was free to leave].) Furthermore, there is no evidence the citizen rider did anything, and the record indicates the exchange between Bostick and Hutcherson was very short.

Hutcherson fails to show that the court erred in denying his motion to suppress.

B. Criminal Justice Administration Fee

As mentioned, the trial court imposed a $564 criminal justice administration (CJA) fee as part of Hutcherson's sentence. At the time, Hutcherson's attorney objected, stating, "I don't believe that [Hutcherson] has a current ability to pay . . . ." The court ruled: "[W]hat we're instructed to do as judicial officers is to refer people to the court's collections and compliance unit [CCU] for an evaluation as to their ability to pay these fines and fees. And if he does not get satisfaction there, then he and/or you can put it back on calendar." The Misdemeanor Order of Probation issued after the sentencing hearing indicates, without qualification, both that the court ordered Hutcherson to pay the CJA fee and that Hutcherson was referred to the CCU in regard to his ability to pay.

Hutcherson contends the trial court erred by imposing the fee without first determining his ability to pay it.

1. Law

The probation order indicates the CJA fee was imposed pursuant to Government Code section "29550 et seq." The parties assume the governing statute here is Government Code section 29550, subdivision (a)(1), which essentially provides that a county may impose a fee if an arrested person is brought to the county jail for

booking or detention. Under subdivision (d) of Government Code section 29550, the court may impose the fee on a convicted defendant based on his ability to pay: "When the court has been notified in a manner specified by the court that a criminal justice administration fee is due the agency: [¶] . . . [¶] (2) The court shall, as a condition of probation, order the convicted person, *based on his or her ability to pay*, to reimburse the county for the criminal justice administration fee, including applicable overhead costs." (Gov. Code, § 29550, subd. (d)(2), italics added.)

2. Application

Hutcherson contends the trial court had to determine his ability to pay the CJA fee *before it imposed* the fee—as opposed to imposing the fee, referring the matter to the CCU, and then giving Hutcherson the opportunity to contest the CCU's determination in court. He does not explain why the language in Government Code section 29550 compels this conclusion; nor does he cite to any legal authority adhering to that position.

Instead, he relies on a case involving a CJA fee authorized in Government Code section 29550.2, subdivision (a).[3] Based on the language in that statute, our Supreme Court held that the "defendant had the right to a determination of his ability to pay the booking fee before the court ordered payment." (*People v. McCullough* (2013) 56 Cal.4th 589, 592-593 (*McCullough*).)

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[3] Government Code section 29550.2, subdivision (a), provides: "Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c), including applicable overhead costs as permitted by federal Circular A 87 standards, incurred in booking or otherwise processing arrested persons. *If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person*, and execution shall be issued on the order in the same manner as a judgment in a civil action, but the order shall not be enforceable by contempt. The court shall, as a condition of probation, order the convicted person to reimburse the county for the criminal justice administration fee." (Gov. Code, § 29550.2, subd. (a), italics added.)

However, *McCullough* is unhelpful to our analysis for two reasons. First, the court did not address the issue before us. The question in *McCullough* was whether the defendant *had* a right to a determination of his ability to pay (and whether he forfeited it), not who could make the determination or whether the requirement could be satisfied by a procedure in which, as here, the court referred the matter to a nonjudicial entity while reserving a right of review. Second, the language considered by the court in *McCullough* is different than the language in the statute at issue here. Subdivision (a) of Government Code section 29550.2, addressed in *McCullough*, reads: "*If* the person has the ability to pay, a judgment of conviction shall contain an order" for payment of the fee (italics added). Subdivision (a) of Government Code section 29550, by contrast, provides that the court shall "order the convicted person, based on his or her ability to pay, to reimburse the county." Whether or not the difference in statutory language is meaningful—an issue we do not decide—the point is that *McCullough* provides no authority for Hutcherson's position.

Nor do Hutcherson's other arguments convince us the trial court could not do what it did. Hutcherson urges that the court had no authority to delegate the ability-to-pay determination to the CCU, citing *In re Pedro Q.* (1989) 209 Cal.App.3d 1368 (*Pedro Q.*) and *People v. Cervantes* (1984) 154 Cal.App.3d 353 (*Cervantes*). In those cases, however, the trial court had allowed probation officers to make a *final* determination (of probation conditions) without any ensuing judicial review. (*Pedro Q.*, *supra*, at p. 1372; *Cervantes*, *supra*, at pp. 355-359 [reversing probation condition ordering defendant to pay victim restitution in an amount to be determined by the probation department, since there was no "statutory provision sanctioning a delegation of *unlimited discretion* to a probation officer to *determine* the propriety, amount, and manner of payment of restitution," italics added].) Here, by contrast, the trial court referred the matter to the CCU but expressly reserved the right to review the CCU's determination if Hutcherson requested it. Because the court retained authority to accept or reject the CCU's finding, the court's procedure is permissible. (See *People v. Hyatt* (1971) 18 Cal.App.3d 618, 626-627 [affirming probation condition requiring defendant to make restitution "in an

amount and manner to be determined by the probation department, subject to review by the court," because "[a]lthough the probation department was ordered to determine the amount and manner of restitution, its determination was subject to review by the court"].)

Hutcherson attempts to distinguish *Hyatt* on the ground that the court in that case did not impose a particular dollar amount before referring the matter to the probation department, while here the court imposed the amount of the fee without waiting for a report from the CCU. But that is merely due to the difference between a fee (which has a stated amount that was previously determined) and restitution (which has no predetermined amount but depends on the facts); it has nothing to do with the principle that delegation to nonjudicial authority is permissible if the court reserves a right of review.

More broadly, Hutcherson maintains, the trial court should not actually impose the fee until receiving the CCU's input: in other words, it must order the matter to the CCU, wait for CCU's finding, make a determination of ability to pay based on the CCU's input, and then, if satisfied, impose the fee. Again, however, Hutcherson fails to establish why it must be done this way.

The statutory mandate is that the CJA fee should be imposed "based on [the convicted person's] ability to pay." (Gov. Code, § 29550, subd. (a).) The procedure employed by the trial court in this case accomplishes that goal. There is no indication in the statute or in the case law that the court cannot order the fee and the CCU's ability-to-pay determination at the same time, as long as the defendant's ability to pay is considered. Nor is there any indication that the court must first refer the matter to the CCU, make a determination after the CCU makes its finding, and only then issue its order. Practically speaking, following the procedure Hutcherson urges would require a second hearing in the trial court—or at least a second and separate consideration by the trial court—in *every* instance that a CJA fee might be imposed; the procedure employed by the court in this case, however, would necessitate an additional court proceeding only if the defendant disagreed with the CCU's assessment. The court's procedure was therefore more efficient, without compromising the purpose of the statute.

Indeed, Hutcherson does not identify any prejudice arising from the court's procedure in this case. There is no indication in the record that the CCU did not determine Hutcherson's ability to pay, or that the court refused to review the CCU's finding, or even that Hutcherson was incorrectly found to have the ability to pay the fee. Hutcherson fails to establish error.

C. Probation Report Fee

The written Misdemeanor Order of Probation provides that Hutcherson was ordered to pay a $176 probation report fee. (See Pen. Code, § 1203.1b.) Both the sentencing judge and Hutcherson signed the Misdemeanor Order of Probation. Hutcherson contends the requirement that he pay the fee must nevertheless be stricken because the trial court did not mention the probation report fee at the sentencing hearing.

As a general matter, a trial court's oral pronouncement controls over the clerk's minute order or other written orders purportedly drafted pursuant to those pronouncements. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Martinez* (2002) 95 Cal.App.4th 581, 587.) We may order modification of an erroneous recording of the court's oral pronouncements to reflect the judgment actually intended and imposed by the judge. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) However, whether the entries in the clerk's minutes should prevail over a contrary statement in the reporter's transcript depends on the circumstances of the case. (*In re Evans* (1945) 70 Cal.App.2d 213, 216.)

Hutcherson urges that the situation here is akin to that in *People v. Zackery* (2007) 147 Cal.App.4th 380. There, "the trial court clerk unlawfully included in the minutes of defendant's sentencing various matters, including a number of fines, that were never orally imposed by the trial judge in the presence of defendant." (*Id*. at p. 387.) The court held: "The clerk cannot supplement the judgment the court actually pronounced by adding a provision to the minute order . . . . [Citation.] [T]he clerk's minutes must accurately reflect what occurred at the hearing." (*Id*. at pp. 387-388.) The

Court of Appeal directed that the items added by the clerk be "stricken from the minutes as they do not reflect the judgment the court pronounced. [Citation.]" (*Id*. at p. 388.)

Here, however, we have a markedly different situation. The Misdemeanor Order of Probation is not just a minute order penned by the clerk, but an order signed by the sentencing judge and *signed by Hutcherson*. Thus, even if the fee requirement was not orally communicated to Hutcherson in court by the judge, it was known by Hutcherson and accepted by him; accordingly, there is no cause to strike it. (See *In re Frankie J.* (1988) 198 Cal.App.3d 1149, 1154-1155 [rejecting contention that a probation condition should have been orally communicated by the judge, since the defendant knew about the condition]; *People v. Thrash* (1978) 80 Cal.App.3d 898, 901-902 [although a defendant should know about the conditions of probation, they need not be stated in open court, especially since they are spelled out on the probation order].) Although these cases dealt with probation conditions rather than a fee, the underlying point is applicable here: Hutcherson cannot complain since he knew about the fee and, indeed, agreed to it as part of an order.

Hutcherson argues that the probation department did not have authority to add fines or fees to the judgment, and that only the trial court may impose fines or fees. But here, the Misdemeanor Order of Probation reciting the fee was an order that *the court signed*, as a true copy of its judgment or order.[4]

Hutcherson fails to demonstrate error.

III. DISPOSITION

The judgment is affirmed.

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[4] We also note that, pursuant to Penal Code section 1203.1b, Hutcherson had the right to an ability-to-pay determination by the court or probation department. Hutcherson does not establish that he in fact had to pay this fee. Nor does he dispute that he was subject to the fee under Penal Code section 1203.1b.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.